Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

ELSEBETH BAUMGARTNER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals Eighth Appellate District of Ohio

PETITION FOR WRIT OF CERTIORARI

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September 29, 2009

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QUESTIONS PRESENTED

I. Is Ohio Revised Code § 2921.03 (Intimidation) constitutional as applied to comments by the defendant who was, at the time the comments were made, an attorney in a proceeding before a particular judge questioning that judge's honesty and integrity which are statements protected by the First Amendment.

II. Is ORC § 2921.05 (Retaliation) constitutional as applied to the publication online of the lyrics of a popular rap song with a few words changed, specifically, substituting the name of a person in the lyrics with the name of the wife of a former co-defendant of the defendant which is a statement of artistic expression that is protected by the First Amendment.

III. Is the alleged victim's subjective feeling of being threatened sufficient to establish a "true threat" under either of the above ORC provisions and take such statements outside the protection of the First Amendment.

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The opinion of the Ohio Supreme Court is published at 2009-0728 and is attached as part of the appendix (Appendix D). The 8th District Court of Appeals Opinion is published at 2009-ohio-624 and is attached as part of the appendix (Appendix A). The trial court decision is unpublished and attached as part of the appendix (Appendix B, C).

JURISDICTION

This Court's jurisdiction to review the decision of the Supreme Court of Ohio is invoked pursuant to 28 U.S.C. § 1257(a). The Supreme Court of Ohio issued its decision on July 1, 2009. This petition has been filed within 90 days of the Ohio Supreme Court's decision.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment makes these amendments applicable to the states in its initial provision:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 30, 2005 Ms. Baumgartner was indicted in case no. 470184 with 18 counts. 11 counts alleging violations of Ohio Revised Code (ORC) § 2921.03 (Intimidation). Two counts of the indictment alleged violations of ORC § 2921.05 (Retaliation). The remaining five counts were comprised four counts of falsification and one count of possessing criminal tools. Her co-defendant in that case was Bryan Dubois, a co-author of an online publication called Erie Voices.

Mr. Dubois eventually accepted a plea agreement resulting in all but four charged being dismissed against him and his entrance into the diversion program. The diversion program enables Mr. Dubois to avoid having a criminal record provided he complied with probation-like conditions for a limited period of time.

During the pendency of case no. 470184, Ms. Baumgartner published online the lyrics from rap artist Eminem's song entitled Soldier (Appendix E). Ms. Baumgartner published the lyrics online after removing much of the vulgar language. She also substituted Eminem's ex wife's name in the original lyric with the name of Mr. Dubois's wife, Mandy. The

lyric in question in Eminem's original song related to his ex-wife, Kim, associated her with the performance of a sexual act and no threat or implication of violence.

Once this modified lyric was published by Ms. Baumgartner, she was indicted on March 23, 2006 for additional counts of intimidation and retaliation in case no. CR-06-478555.

On November 15, 2006, Ms. Baumgartner entered a no contest plea in both cases. In CR-06-478555 she plead no contest to 4,5 and 9 (Intimidation) and 12, 13 (Retaliation). In CR-05-470184 she plead no contest to counts 1,3,4,5,6,7,8,9 and 10 (Intimidation) and counts 12 and 13 (Retaliation).

The court sentenced her to four years each for the counts in CR-06-478555 with all sentences to run concurrent. The court sentenced her to four years each for the counts in CR-05-470184 with all sentences to run concurrent. The court ordered that the two four year sentences run consecutive to each other for a total of eight years in prison.

On March 10, 2009, the court of appeals affirmed the trial court's judgment of conviction and sentence. (Appendix A)

On July 1, 2009, the Ohio Supreme Court declined to accept the case for review. (Appendix D).

REASONS FOR GRANTING THE PETTION

This court defined a "true threat" as follows: "'True threat[s]' encompass those statements where the speaker means to communicate a serious expression of

an intent to commit an act of unlawful violence to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

However, this court has left unanswered whether a court can ground its ruling of no First Amendment protection solely in the subjective reaction of fear in the intended hearer of the speech. In this case, Ms. Baumgartner plead no contest but was found guilty by the court. As the appellate court noted, she was found guilty of a "true threat" because the alleged victims felt afraid or threatened.

The question this court can answer by accepting this case is whether the subjective fear or feeling of being threatened by the intended hearer of speech is sufficient to remove that speech from First Amendment protection.

TWO SEPARATE ALLEGED THREATS COVERED BY THE STATUTE

Ms. Baumgartner's case involves two separate alleged threats that the Ohio courts found were not protected by the First Amendment. One was alleged to have been made towards an Ohio State Court Judge presiding over a matter in which she was counsel for a party. That alleged threat resulted in her initial indictment. The other threat was alleged to have been made towards a one-time co-defendant in Ms. Baumgartner's criminal case, Bryan Dubois.

ALLEGED THREAT AGAINST JUDGE MARKUS

Judge Markus was the presiding judge in a civil matter in which Ms. Baumgartner was counsel for one of the parties. During and after the proceedings at the trial court level, Ms. Baumgartner communicated with Judge Markus, two of his relatives and members of two organizations on whose board of directors he sat. Those communications did not involve any threat to Judge Markus. Instead, those communications merely asserted that Judge Markus was involved in either illegal or unethical behavior in his role as both a retired, visiting judge throughout Ohio and the co-owner of a private judging company operating within Ohio. None of those communications threatened the judge in any way.

ALLEGED THREATS AGAINST FORMER CO-DEFENDANT DUBOIS

Ms. Baumgartner was indicted along with a co-owner and co-author of online postings both defendants published at erievoices.com. Bryan Dubois, her co-defendant, eventually decided to accept a plea offer in exchange for cooperating with the State of Ohio in Ms. Baumgartner's prosecution. At some point during her criminal case, Ms. Baumgartner published online the lyrics to an Eminem song entitled Soldier.

The alleged threat against Mr. Dubois was, in fact, only the insertion of his wife's name into those lyrics. The Eminem lyrics published online were also modified by Ms. Baumgartner to remove vulgarity. In addition, the original lyric references a sex act and Eminem's former wife, Kim by name. Ms.

Baumgartner substituted the word Kim for the name of her co-defendant's wife, Mandy. Any references to violence remaining in the lyrics as posted by Ms. Baumgartner were part of the original Eminem lyrics.

In affirming Ms. Baumgartner's conviction, the Eighth District Court of Appeals held that Bryan and Mandy DuBois felt threatened and that their subjective fear is the basis for finding a true threat. Appendix A at ¶52.

The only threats of violence contained in the song lyrics were not attached to Mr. Dubois nor his wife. Those threats of violence were already a part of Eminem's original lyrics.

The Ohio courts improperly relied solely on the alleged victim's subjective fear of the statements in determining the First Amendment did not apply to Ms. Baumgartner's artistic expression involved in the alteration of the lyrics.

THE PUBLICATION OF THE ALTERED LYRICS WAS ARTISTIC EXPRESSION

The Publication of the altered lyrics posting was artistic expression and was protected by the First Amendment. In contrast to a "true threat," artistic expression unquestionably lies within First Amendment protections. *Nat'l Endowment for the Arts v. Finely*, 524 U.S. 569, 602 (1998). That protection turns on the expressive character of the work. Id., citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Generally, creative works like music, literature, and art are protected as artistic expression. *Hurley v. Irish-American Gay, Lesbian, and BiSexual*

Group of Boston, 515 U.S. 557, 569 (1995). In the instant case, if this Court assumes that Ms. Baumgartner posted the altered lyrics at issue, the lyrics have an expressive quality that shields them from prosecution. Before they were altered, Eminem's rap lyrics would have been protected as artistic expression under the First Amendment. Reading a poem or singing a song is typically protected first amendment speech.

TRUE THREATS

"'True threat[s]' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

The Supreme Court's minimal guidance has left each circuit to fashion its own test. The majority of federal circuits have developed a version of a reasonable person test, but are split over whether the test should be from the perspective of the speaker or the listener.

The "objective test" considers where the alleged "true threat" is made in a context or under such circumstances where a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.

Under the First Amendment right of free speech, only a true threat suffices for a conviction for felony harassment. *State v. Kilburn*, 84 P.3d 1215, 151

Wash. 2d 36 (2004). Thus, speech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of "true threats" to physical safety. *State v. Williams*, 26 P.3d 890, 144 Wash. 2d 197 (2001).

THE INTIMIDATION AND RETALIATION STATUTES ARE VAGUE AS APPLIED TO MS. BAUMGARTNER

In order to survive a void-for-vagueness challenge, the statute must be written so that a person of common intelligence is able to determine what conduct is prohibited, and secondly, the statute must provide sufficient standards to prevent arbitrary or discriminatory enforcement. *State v. Williams*, 2000-Ohio-428.

A vague statute also affects sensitive areas of First Amendment freedoms operates to inhibit the exercise of those freedoms. *Akron v. Rowland*, 1993-Ohio-222, citing *Grayned v. Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

In determining whether a statute fairly informs a person of ordinary intelligence and understanding what is prohibited, courts should consider the challenged phrase in the context it is used in the law, and not as it stands alone. *State v. Reeder*, 479 N.E.2d 280, 18 Ohio St.3d 25, 27 (1985). A statute is overbroad if within its reach it prohibits constitutionally protected First Amendment conduct. *Akron*, 618 N.E.2d 138, 67 Ohio St.3d at 387. A statute is substantially overbroad if it is "susceptible of regular application to protected expression." FN22

The appeals court then dispatched with Ms. Baumgartner's First Amendment argument relying entirely on the alleged victim's subjective feeling of being threatened. "However, the critical question is whether the victim subjectively believed at the time of the offense that the offender would cause serious physical harm." Appendix A at ¶52.

Both the Retaliation and Intimidation statutes are vague as applied to Ms. Baumgartner and these facts since the Ohio courts have ground their application in the subjective and unpredictable reaction of the intended hearer of the speech. This type of analysis is the essence of vague inviting discriminatory enforcement.

THE U.S. SUPREME COURT RULE

This court in *Watts v. U.S.*, 394 U.S. 705, (1969), suggested several factors which a court should consider in determining whether or not a statement is a true threat: (1) whether or not the speech constitutes political hyperbole; (2) the overall context in which the statement is made; (3) the reaction of the listeners; and (4) whether or not the statement was conditional, especially if it was conditional on an event that was unlikely to occur.

The statements in Ms. Baumgartner's two cases do not meet this court's test such that they are outside First Amendment protection.

The 2nd Circuit has elaborated on this court's ruling and held that a "[Statement is a true threat] so long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional,

immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution" *U.S. v. Kelnar*, 534 F.3d 1020, 1027 (2d Cir. 1976). Ms. Baumgartner's statements do not meet the Second Circuit's test for being outside First Amendment protection.

Other Circuits are all over the map on their analysis leaving an opportunity for this court to accept this case and normalize the Circuit Court's "true threat" analysis.

Whether a statement constituted a true threat is a question of fact for the jury. *U.S. v. Kosma*, 951 F.2d 549 (3d Cir. 1991).

"The court essentially asks a single question: Would a reasonable recipient of the communication consider it to be a threat? If so, then the court will impute to the defendant the general intent to threaten and will assume that the "true threat" test has been met." *U.S. v. Darby*, 37 F.3d 1059 (4th Cir. 1994).

The Fifth Circuit defined a threat as a communication which "in its context . . . would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *U.S. v. Myers*, 104 F.3d 76 (5th Cir. 1997)

The Sixth Circuit relies heavily on the reasonable expectations of the hearer (or in Ms. Baumgartner's case, the reader). *U.S. v. Alkhabaz*, 104 F.3d 1392 (6th Cir. 1997). The Sixth Circuit requires that the government show the speaker met both elements of the following test:

1. Objective Test: to constitute "a communication containing a threat"...a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus). *Alkhabaz*, 104 F.3d at 1495.

The Seventh, Eighth, Ninth, Tenth and Eleventh Circuits use the same test with a slight twist. "The test for whether a statement is a threat is an objective one; it is not what the defendant intended but whether the recipient could reasonably have regarded the defendant's statement as a threat." *e.g. United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990).

The D.C. Circuit court leaves the issue of a "true threat" an issue of constitutional significance, up to a jury. *U.S. v. Syring*, 522 F. Supp. 2d 125 (D.C. Cir. 2007).

CONCLUSION

For the reasons noted above, including the opportunity for this court to normalize the rulings of the 50 states and the various federal circuits regarding the proper "true threat" analysis, this court should accept jurisdiction in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

Nos. 89190, 91207, and 91208

Released: February 12, 2009

STATE OF OHIO,	)
	)
PLAINTIFF-APPELLEE	)
	)
vs.	)
	)
ELSEBETH BAUMGARTNER,	)
	)
DEFENDANT-APPELLANT	)
	)

JUDGMENT:
AFFIRMED AND REMANDED
FOR CORRECTION OF JOURNAL ENTRY
IN CASE NO. CR-470184

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-470184 and CR-478555

BEFORE: Blackmon, J., Cooney, A.J., and Boyle, J.

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} In this consolidated appeal, appellant, Elsebeth Baumgartner ("Baumgartner"), appeals her convictions following no contest pleas. Baumgartner assigns eight errors for our review.[1]

{¶ 2} Having reviewed the record and pertinent law, we affirm Baumgartner's convictions and remand consistent with this opinion. The apposite facts follow.

{¶ 3} The Cuyahoga County Grand Jury indicted Baumgartner in two separate cases. On August 15, 2005, in Case No. CR-470184, the grand jury indicted Baumgartner on eleven counts of intimidation, two counts of retaliation, one count of possessing criminal tools, and four counts of falsification.

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[1] See appendix.

{¶ 4} The above indictments stemmed from Baumgartner's conduct against retired Judge Richard Markus ("Judge Markus"). Judge Markus presided as a retired visiting judge over civil cases in Erie and Ottawa counties involving Baumgartner. In those proceedings, Judge Markus found Baumgartner to be a vexatious litigator and found her liable to opposing parties.

{¶ 5} At the conclusion of the civil cases, Judge Markus complained to law enforcement officials about Baumgartner's conduct during the pendency of the civil matter. Judge Markus specifically complained that Baumgartner, in an effort to intimidate him, repeatedly sent him e-mails accusing him and other public officials of wrongdoing. The indictments also charged Baumgartner with allegedly sending e-mails containing materially false information to Judge Markus's three adult children, in an effort to intimidate Judge Markus.

{¶ 6} On March 23, 2006, in Case No. CR-478555, the grand jury returned a second multi-count indictment against Baumgartner. This indictment(s) charged Baumgartner with one count of falsification, ten counts of intimidation, two counts of retaliation, and one count of possessing criminal tools.

{¶ 7} The second set of indictments stemmed from Baumgartner's alleged conduct against Bryan Dubois, her co-defendant in the first case. The indictment charged Baumgartner with retaliating against Dubois and his wife for their alleged role as government witnesses in Baumgartners's first case.

{¶ 8} The indictment alleged that Baumgartner posted a modified version of a rap song by national recording artist Eminem on the internet. The indictment alleged that in the modified rap song, Baumgartner intimidated the Duboises by referencing domestic violence in the Duboises's household in the same breath as children services.

{¶ 9} On November 15, 2006, pursuant to a plea agreement with the State, Baumgartner pleaded no contest to ten counts of intimidation and two counts of retaliation in Case No. CR-470184. Pursuant to the plea agreement, the State dismissed the remaining charges. The trial court found Baumgartner guilty of seven counts of intimidation and two counts of retaliation in Case No. CR-470184.

{¶ 10} On that same date, pursuant to another plea agreement with the State, Baumgartner pleaded no contest to four counts of intimidation and two counts of retaliation in Case No. CR-478555. Pursuant to the plea agreement, the State dismissed the remaining charges. The trial court found Baumgartner guilty of three counts of intimidation and two counts of retaliation.

{¶ 11} On December 21, 2006, in Case No. CR-470184, the trial court sentenced Baumgartner to concurrent prison terms of four years on each count. In Case No. CR-478555, the trial court also sentenced Baumgartner to concurrent prison terms of four years on each count. The trial court ordered the sentences in the two cases to be served consecutively for a total of eight years in prison.

Insufficient Proffer

{¶ 12} In the first assigned error, Baumgartner argues her convictions must be reversed because the State's proffers were insufficient to establish the offenses. We disagree.

{¶ 13} The record indicates that the instant convictions were entered pursuant to no contest pleas.

{¶ 14} Crim.R. 11(B)(2) states in pertinent part as follows:

> **"The plea of no contest is not an admission of defendant's guilt, but is an admission of truth of facts alleged in the indictment** ***."

{¶ 15} Where a defendant charged with a crime enters a plea of no contest to the complaint, indictment, or information, sufficiency of the evidence is not an issue for either the trial court or an appellate court.[2] Rather, the issue is whether the facts alleged in the complaint or the indictment state a crime. If the answer to the question is in the affirmative, both trial and appellate inquiry cease.[3]

{¶ 16} Further, we have previously stated that a plea of no contest made in compliance with Crim.R. 11, in which a defendant admits the truth of the facts alleged in the indictment, waives any error about the

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[2] *State v. DeLawder* (June 24, 1980), 5th Dist. Case No. 2685.

[3] Id.

sufficiency of the evidence the State might produce to support the charges.[4] The effect of the "no contest" plea is to admit the truth of all the factual allegations in the indictment and to relieve the prosecutor of the burden of proving the defendant guilty beyond a reasonable doubt.[5]

{¶ 17} Consequently, Baumgartner's "no contest" pleas admitted the facts alleged in the indictment and rendered moot any objection she might have had to the sufficiency of the State's proffers.[6] Accordingly, we overrule the first assigned error.

Venue

{¶ 18} In the second assigned error, Baumgartner argues her convictions must be reversed because venue was improper for indictments. We disagree.

{¶ 19} The proper venue of a case is governed by R.C. 2901.12(A), which provides in pertinent part as follows:

> **"**** a criminal case *** shall be held in a court having jurisdiction of the subject matter, and in the territory of which the**

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[4] *State v. Velez* (May 4, 1995), Cuyahoga App. No. 67595; *State v. Morales* (May 7, 1992), Cuyahoga App. No. 62075; *State v. Willis* (Dec. 16, 1993), Cuyahoga App. No. 64433.

[5] *State v. Ball* (July 17, 1997), Cuyahoga App. No. 71036.

[6] See *State v. Moses* (Aug. 13, 1991), 2nd Dist. No. 12293; *State v. Harvey* (Aug. 19, 1993), Cuyahoga App. No. 63436.

offense or any element of the offense was committed."

{¶ 20} It is well settled that venue is a fact to be proven at trial.[7] Since Baumgartner's pleas of no contest waived her right to a trial, thereby obviating the State's burden of proof as to the elements of the charged crimes, her venue claim was waived as well. Thus, when a defendant pleads no contest to an indictment, it is an admission of the proper venue.[8]

{¶ 21} Moreover, the record indicates that Judge Markus, the alleged victim in Case No. CR-470184, received e-mails from Baumgartner at his home in Cuyahoga County, Ohio. Since Judge Markus received the e-mails in Cuyahoga County Ohio, the State established venue in Case No. CR-470184 in Cuyahoga County.

{¶ 22} The record also indicates that the charges in Case No. CR 478555 stemmed from Baumgarter's web posting of a parody to a rap song in Erie County, Ohio. The indictment alleged that the web posting was designed to intimidate and to retaliate against Dubois, who was a State's witness in the case involving Judge Markus. Since Dubois was a State's witness in the case involving Judge Markus, Baumgartner's alleged conduct against Dubois impacted the first case.

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[7] *State v. Bobinchuck* (Sept. 13, 2000), 9th Dist. No. 19536, citing *State v. Headley* (1983), 6 Ohio St.3d 475, 477.

[8] *State v. Johnson* (May 30, 2001), 9th Dist. No. 99 CA 7449; *State v. Schmidhammer* (May 24, 1994), 10th Dist. No. 93APC10-1452; *State v. Ulrich* (Feb. 12, 1990), 5th Dist. No. CA-7905.

{¶ 23} R.C. 2901.12(H) states in pertinent part as follows:

> **"When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, he may be tried for all such offenses in any jurisdiction in which one such offense or any element thereof occurred.***"**

{¶ 24} We conclude that Baumgartner's alleged actions against Judge Markus and Dubois were part of the same course of criminal conduct, therefore, venue was also established for Case No. CR-478555 in Cuyahoga County Ohio. Accordingly, we overrule the second assigned error.

Knowingly, Intelligently and Voluntarily

{¶ 25} In the third assigned error, Baumgartner argues her no contest pleas in both cases were not knowingly, intelligently, and voluntarily made. We disagree.

{¶ 26} Within this assigned error, Baumgartner argues that Counts 4 and 5 of Case No. CR-478555 fail to include the element that she used "a materially false or fraudulent writing" in an attempt to influence a witness. We are not persuaded.

{¶ 27} Counts 4 and 5 of Case No. CR-478555 alleged that Baumgartner violated R.C. 2921.03, which provides in pertinent part as follows:

> **"(A) No person, knowingly and by force, by unlawful threat of harm to any person or**

> **property, or by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner, shall attempt to influence, intimidate, or hinder a public servant ***, party official, or witness in the discharge of the person's duty."**

{¶ 28} A review of the record indicates that Counts 4 and 5 of the indictment do not include the phrase "materially false or fraudulent writing." However, that is not fatal. The record indicates that the State proffered that Baumgartner attempted to intimidate DuBois "by force or by unlawful threat of harm," specifically through threats contained in altered rap lyrics posted on the internet. The State also indicated that the Duboises, believing the threat to be real, fled Ohio for a period of time.

{¶ 29} Further, the record indicates that all the discussion relating to Counts 4 and 5 involved whether the Duboises viewed the altered rap lyrics as a threat of harm, not whether the content of the lyric was false or materially false. The record indicates the following discussion concerning the rap lyric:

> "Mr. Gasper: **It would take a lot to say that was a threat out of that poem.**
>
> **The Court: That's exactly what it was.**
>
> **Mr. Peterson: You think so?**
>
> **The Court: Absolutely, positively, exactly.**

Mr. Peterson: To who? To who, Judge?

The Court: It was to Bryan Dubois. And, not only was it to Bryan Dubois, but it was talking about his wife and it talked about his kids. * It was exactly a threat to him. To tell him that she was going to resort to violence if necessary."[9]**

{¶ 30} The above excerpt reveals that the thrust of the indictment, under R.C. 2921.03, specifically "by force or by unlawful threat of harm," was supported by the discussion on the record. Consequently, we find this contention to be without merit.

{¶ 31} Within this assigned error, Baumgartner argues that her pleas were not knowingly, intelligently, and voluntarily made because Count 9 of Case No. CR-478555 indicates the date of the offense as January 29, 2006, but the State proffered January 30, 2006, as the date of the offense. We are not persuaded.

{¶ 32} Specificity as to the time and date of an offense is not required in an indictment.[10] Under R.C. 2941.03(E), "an indictment or information is sufficient if it can be understood therefrom:* * * (E) That the

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[9] Tr. 934-935.

[10] *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, citing *State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632.

offense was committed at some time prior to the time of filing of the indictment"* * *. "An indictment is not invalid for failing to state the time of an alleged offense or doing so imperfectly. The State's only responsibility is to present proof of offenses alleged in the indictment, reasonably within the time frame alleged."[11]

{¶ 33} A review of the record indicates that the bill of particulars correctly identified the date of the offense as January 30, 2006. Despite the indictments alleging the incorrect date, it did not prejudice Baumgartner, because the indictment and bill of particulars alleged sufficient facts to apprise Baumgartner of the charges against her. Consequently, we find this contention without merit.

{¶ 34} Within this assigned error, Baumgartner argues that her pleas were not knowingly, intelligently, and voluntarily made because the trial court incorrectly stated that she was pleading no contest to twenty-one felonies instead of eighteen. Thus, she was not aware of the maximum penalty involved. We are not persuaded.

{¶ 35} In the instant case, it is undisputed that the trial court incorrectly stated the number of felonies. However, Baumgartner was not prejudiced. In order to challenge the validity of a plea, a defendant must show

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[11] Id., quoting *Shafer* at ¶17-18.

a prejudicial effect.[12] The test for prejudice is whether the plea would have otherwise been made.[13]

{¶ 36} Here, despite the misstatement, the trial court did advise Baumgartner that each felony was a third degree felony, punishable from one-to-five years in prison. Baumgartner indicated that she understood.[14] Baumgartner subsequently entered no contest pleas and the trial court found her guilty of a total of fifteen third degree felonies. Consequently, Baumgartner has failed to show how she was prejudiced by the misstatement. Accordingly, we overrule the third assigned error.

Equal Protection

{¶ 37} In the fourth assigned error, Baumgartner argues her conviction on Counts 4 and 5 of Case No. CR-478555 violates the Equal Protection Clause of the U.S. Constitution. We disagree.

{¶ 38} Baumgartner argues that she should not have been charged with felony intimidation, pursuant to R.C. 2921.04(B), in Counts 4 and 5 of Case No. CR-478555. In the third assigned error, we concluded that Baumgartner was charged, pleaded no contest and was found guilty of felony intimidation, pursuant to R.C. 2921.03, in Count 4 and 5 of Case No. CR-478555.

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[12] *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

[13] Id.

[14] Tr. 776.

{¶ 39} Here, the record reflects that Baumgartner was not convicted of any counts under R.C. 2921.04(B). Consequently, this assertion is moot. Accordingly, we overrule the fourth assigned error.

Vague and Overbroad Statutes

{¶ 40} In the fifth assigned error, Baumgartner argues the intimidation and retaliation statutes are vague and overbroad. We disagree.

{¶ 41} Initially, we note that a statute enjoys strong presumption of constitutionality.[15] Statutes enacted in Ohio are presumed to be constitutional.[16] This presumption of constitutionality remains unless it is proven beyond a reasonable doubt that the legislation is clearly unconstitutional.[17]

{¶ 42} In order to survive a void-for-vagueness challenge, the statute must be written so that a person of common intelligence is able to determine what conduct is prohibited, and secondly, the statute must provide sufficient standards to prevent arbitrary or discriminatory enforcement.[18] Third, but related, a vague statute that abuts upon sensitive areas of First

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[15] *State v. Mihely*, 11th Dist. Nos. 2001-A-0083 and 2001-A-0084, 2002 Ohio-6939, citing *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291.

[16] Id.

[17] *State v. Williams*, 88 Ohio St.3d 513, 521, 2000-Ohio-428.

[18] Id.

Amendment freedoms operates to inhibit the exercise of those freedoms.[19]

{¶ 43} In determining whether a statute fairly informs a person of ordinary intelligence and understanding what is prohibited, courts should consider the challenged phrase in the context it is used in the law, and not as it stands alone.[20] A statute is overbroad if within its reach it prohibits constitutionally protected First Amendment conduct.[21] A statute is substantially overbroad if it is "susceptible of regular application to protected expression."[22]

{¶ 44} Baumgartner argues that the intimidation and retaliation statutes operate to hinder First Amendment freedoms and impermissibly prohibits protected First Amendment conduct. We are not persuaded.

{¶ 45} We have previously listed the statutory language for intimidation. The retaliation statute states as follows:

> **"No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against a public**

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[19] *Akron v. Rowland*, 67 Ohio St.3d 374, 381, 1993-Ohio-222, citing *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222.

[20] *State v. Reeder* (1985), 18 Ohio St.3d 25, 27.

[21] *Akron*, 67 Ohio St.3d at 387.

[22] Id.

> **servant, a party official, or an attorney or witness who was involved in a civil or criminal action or proceeding because the public servant *** discharged the duties of the public servant ***."**[23]

{¶ 46} The statutes dealing with intimidation and retaliation are not vague, but are sufficiently definite, so that a person of common intelligence would be able to determine what conduct is prohibited under each offense. We also find that the statutes provide sufficient standards to prevent arbitrary or discriminatory enforcement.

{¶ 47} In addition, the statutes do not impinge or impermissibly inhibit Baumgartner's exercise of her First Amendment rights, including, but not limited to, her right to voice displeasure with governmental conduct and policies, and to request redress of grievances.[24]

{¶ 48} In the instant case, the trial court issued an opinion, which states in pertinent part as follows:

> **"*** This Court carefully reviewed the conduct of Ms. Baumgartner, where she instituted a practice of filing civil allegations against Honorable Judge Markus. These smarmy complaints were never accompanied with a request for service on Judge Markus. Instead of**

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[23] R.C. 2921.05.

[24] See *State v. Roten*, 149 Ohio App.3d 182, 2002-Ohio-4488.

seeking service on Judge Markus, Ms. Baumgartner would either contact Judge Markus personally or make a copy of her complaint, to be delivered to him, for the sole purpose of intimidating him. The timing, method and purpose of giving Judge Markus a copy of these documents on the eve of defendant's scheduled court dates clearly and without reasonable doubt were completed in such a manner for the sole purpose to intimidate Judge Markus and to stifle justice in this manner. This Court further acknowledges the email sent to Bryan Dubois, an original co-defendant, where Ms. Baumgartner indicated an interest in Judge Markus' children. * This was an attempt to intimidate Judge Markus. Such language contained in this email has a clear intent to intimidate Judge Markus when referencing his own children."**

{¶ 49} We conclude that the two statutes at issue are not vague, overbroad, or violative of Baumgartner's First Amendment rights. In the instant case, the trial court found that it was the timing and method and purpose of the speech, which satisfied the elements of intimidation and retaliation. As such, Baumgartner's constitutional challenges are not well-taken. Accordingly, we overrule the fifth assigned error.

First Amendment

{¶ 50} In the sixth assigned error, Baumgartner argues that the altered rap lyrics are artistic expressions, and thus protected by the First Amendment. We disagree.

{¶ 51} It has been recognized that threats that intimidate or cause fear or apprehension by the recipient are unprotected by the First Amendment.[25] As previously discussed, the trial court found the altered rap lyrics to be a threat of physical violence directed at Bryan and Mandy Dubois. In addition, the trial court found that the altered lyrics referenced Dubois's wife by name and his children.

{¶ 52} Nonetheless, Baumgartner maintains that the altered rap lyrics did not constitute a true threat. However, the critical question is whether the victim subjectively believed at the time of the offense that the offender would cause serious physical harm.[26] Here, as previously discussed the Duboises fled the State of Ohio for a period of time after Baumgartner posted the altered rap song on the internet.

{¶ 53} We conclude, given the effect of the internet posting, that the altered lyrics constituted a true threat and, as such, was not protected by the First

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[25] *Dayton v. Dunnigan* (1995), 103 Ohio App.3d 67, 71, citing *Mozzochi v. Borden* (C.A.2, 1992), 959 F.2d 1174; *United States v. Khorrami* (C.A.7, 1990), 895 F.2d 1186; *United States v. Bellrichard* (C.A.8, 1993), 994 F.2d 1318; *United States v. Lee* (C.A.8, 1991), 935 F.2d 952.

[26] *State v. Perkins*, Cuyahoga App. No. 86685, 2006-Ohio-3678.

Amendment. Accordingly, we overrule the sixth assigned error.

Content-Based Speech Regulation

{¶ 54} In the seventh assigned error, Baumgartner argues that R.C. 2921.03(A) is unconstitutional because it is a content-based regulation of speech, which violates the First Amendment. We disagree.

{¶ 55} Content-based regulations are presumptively invalid.[27] However, certain areas of speech, such as obscenity, defamation, and fighting words, can consistently with the First Amendment, be regulated because of their constitutionally proscribable content.[28] Thus, even the prohibition against content discrimination is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech.[29]

{¶ 56} The United States Supreme Court identified three categories of content discrimination that may be regulated: (1) "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable,"[30] (2) when a content-defined subclass of proscribable speech "happens to be associated with particular 'secondary

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[27] *R.A.V. v. St. Paul* (1992), 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305.

[28] Id. at 383.

[29] Id.

[30] Id. 388.

effects' of the speech, so that the regulation is 'justified without reference to the content of the *** speech,"[31] and (3) when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[32]

{¶ 57} In the instant case, R.C. 2921.03(A) regulates the secondary effects of speech. As previously discussed, the trial court found Baumgartner's timing, method, and purpose of speech troubling. The trial court found Baumgartner's purpose was to intimidate Judge Markus and interfere with the judicial process.

{¶ 58} We conclude R.C. 2921.03(A) is not a content-based regulation of speech

{¶ 59} by virtue of its regulation of writings that attempt to intimidate, influence, or hinder a public servant, party official, or witness. Accordingly, we overrule the seventh assigned error.

Public Policy

{¶ 60} In the eighth assigned error, Baumgartner argues that public policy dictates that she enjoys an absolute immunity from criminal prosecution for making false allegations within a civil lawsuit. We disagree.

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[31] Id. 389.

[32] *State v. Baker*, 157 Ohio App.3d 87, 2004-Ohio-2207, quoting *R.A.V.* at 390.

{¶ 61} As previously discussed, the timing, method and purpose of the allegedly false allegations were designed to intimidate Judge Markus in carrying out his judicial duties. As such, Baumgartner's conduct constituted intimidation in violation R.C. 2921.03. Accordingly, we overrule the eighth assigned error.

Case No. CR-470184 / Counts 3 and 11

{¶ 62} On February 4, 2008, we remanded the instant case to the trial court because there was no journal entry sentencing Baumgartner on Counts 4, 5, and 9 of Case No. CR-470184 and Counts 5, 12, and 13 of Case No. CR-478555.

{¶ 63} A review of the record indicates that the trial court's subsequent journal entry, dated February 28, 2008, contains clerical errors. The journal entry incorrectly states that the trial court sentenced Baumgartner to four-year concurrent prison terms and fined $ 250 on Counts 3 and 11 of Case No. CR-470184. However, the transcript clearly states, and the State of Ohio concedes, that the trial court found Baumgartner not guilty of Counts 3 and 11 of Case No. CR-470184.

{¶ 64} These errors do not affect the instant appeal; however, we vacate the sentences for the additional counts in Case No. CR-470184. We also order the trial court to correct the journal entry in Case No. CR-470184 to reference the deletion of sentences in Counts 3 and 11.

Judgment affirmed and remanded.

It is ordered that appellee recover of appellant its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction of journal entry and execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, A.J., and MARY J. BOYLE, J., CONCUR

APPENDIX

Assignments of Error

"I. Appellants conviction on all 15 counts must be reversed because the State's proffers were insufficient to establish the offense."

"II. Venue is improper for all counts in both indictments, requiring reversal of appellant's convictions."

"III. Defendant-Appellant's no contest pleas in both cases were not knowingly, intelligently and voluntarily made and the indictment in Case No. 06-CR-478555 is

defective in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 16 of the Ohio Constitution."

"A. Mrs. Baumgartner's no contest pleas to Counts 4 and 5 of Case No. 478555 were involuntary because the elements of R.C. 2921.03 are not stated in the indictment. Also, Count 9 of Indictment No. 478555 does not match the date the State proffered for that count."

"B. The trial court did not ensure that Mrs. Baumgartner understood the nature of the charges or the maximum penalty for the crimes charged."

"IV. Appellant's convictions on Counts 4 and 5 in Case No. 478555 violate the Equal Protection Clause of the U.S. Constitution and Sec. 16, Art. I of the Ohio Constitution."

"V. The retaliation statute [R.C. 2921.05] and the intimidation statutes [both R.C. 2921.04(B) and R.C. 2921.03] and are overbroad on their face, while R.C. 2921.05 and R.C. 2921.04(B) are also overbroad as applied in this case and, as such, violate appellant's rights of access to the courts, Due Process, and her right to speech and to petition for redress of grievance under the First and Fourteenth Amendments and

Art. IV of the United States Constitution and Sec. II, Art. I of the Ohio Constitution."

"VI. Defendant-Appellant's convictions on Counts 4, 5, 12 and 13 in Case No. 47855 violate the First Amendment to the United States Constitution and Art. I, Sec. II of the Ohio Constitution because the altered rap song lyrics in question do not constitute a true threat and they are protected artistic expression."

"VII. R.C. 2921.03(A) constitute an unconstitutional content-based regulation of speech in violation of the First Amendment to the U.S. Constitution and Sec. 11, Art. I of the Ohio Constitution, requiring a reversal of Appellant's convictions on Counts 1, 4, 5, 6, 7, 8, 9, and 10 in Case No. 470184."

"VIII. Public policy dictates that appellant should have absolute immunity from criminal prosecution for making false allegations within civil lawsuits, requiring a reversal of her convictions on Counts 8, 9, 10, 12 and 13 in Case No. 470184."

APPENDIX B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No: CR-05-470184-A

[Filed December 21, 2006]

THE STATE OF OHIO	)
Plaintiff	)
	)
ELSEBETH BAUMGARTNER	)
Defendant	)
	)

JOURNAL ENTRY

Judge: SHIRLEY STRICKLAND SAFFOLD

INDICT: 2921.03 INTIMIDATION
2921.03 INTIMIDATION
2921.03 INTIMIDATION
ADDITIONAL COUNTS...

DEFENDANT IN COURT. COUNSEL FRANK GASPER & MIKE PETERSON PRESENT.
COURT REPORTER PRESENT.
ON A FORMER DAY OF COURT, THE DEFENDANT PLEAD NO CONTEST AND WAS FOUND GUILTY BY THE COURT OF INTIMIDATION 2921.03 - F3 AS CHARGED IN COUNT(S) 1, 3, 4, 5, 6, 7, 8, 9, 10 OF THE INDICTMENT.

ON A FORMER DAY OF COURT, THE DEFENDANT PLEAD NO CONTEST AND WAS FOUND GUILTY BY THE COURT OF RETALIATION 2921.05 - F3 AS CHARGED IN COUNT(S) 12, 13 OF THE INDICTMENT.
DEFENDANT ADDRESSES THE COURT.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE OHIO REFORMATORY FOR WOMEN OF 4 YEAR(S).
4 YEARS ON EACH OF COUNTS 1, 3, 4, 6, 7, 8, 9 AND 10. COUNTS TO RUN CONCURRENT TO EACH OTHER, BUT SENTENCE TO RUN CONSECUTIVE TO CR 478555.
POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 3 YEARS FOR THE ABOVE FELONY(S) UNDER R.C. 2967.28.
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT TO PAY $250.00 FINE ON EACH OF COUNTS 1, 3, 4, 6, 7, 8, 9 AND 10.
DEFENDANT IS TO PAY COURT COSTS.

12/18/2006
CPEDB 12/21/2006 13:11:58

/s/ 12-21-06
Judge Signature Date
[Adm Judge]
[assigned Judge unavailable]

SENT
12/18/2006 Sheriff Signature /s/ 12-22-06

APPENDIX C

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No: CR-05-470184-A

[Filed November 20, 2006]

THE STATE OF OHIO Plaintiff	)
ELSEBETH BAUMGARTNER Defendant	)

JOURNAL ENTRY

Judge: SHIRLEY STRICKLAND SAFFOLD

INDICT: 2921.03 INTIMIDATION
2921.03 INTIMIDATION
2921.03 INTIMIDATION
ADDITIONAL COUNTS...

DEFENDANT IN COURT WITH COUNSEL FRANK GASPER. PROSECUTING ATTORNEY MARTIN KEANE AND DANIEL KASARIS PRESENT.
ADDITIONAL COUNSEL MIKE PETERSON PRESENT.
COURT REPORTER PRESENT.
DEFENDANT WITHDRAWS FORMER PLEA OF NOT GUILTY AND ENTERS A PLEA OF NO

CONTEST TO COUNT(S) 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13.
THE COURT ADVISES THE DEFENDANT OF ALL CONSTITUTIONAL RIGHTS AND PENALTIES AND UPON THE EVIDENCE PROFFERED FINDS THE DEFENDANT GUILTY OF INTIMIDATION 2921.03 - F3 AS CHARGED IN COUNT(S) 1, 3, 4, 5, 6, 7, 8, 9, 10 OF THE INDICTMENT.
THE COURT ADVISES THE DEFENDANT OF ALL CONSTITUTIONAL RIGHTS AND PENALTIES AND UPON THE EVIDENCE PROFFERED FINDS THE DEFENDANT GUILTY OF RETALIATION 2921.05 - F3 AS CHARGED IN COUNT(S) 12, 13 OF THE INDICTMENT.
COUNT(S) 2, 11, 14, 15, 16, 17, 18 IS/ARE NOLLED.
THE DEFENDANT IS REFERRED TO THE COUNTY PROBATION DEPARTMENT FOR A PRE-SENTENCE INVESTIGATION AND REPORT.
SENTENCING SET FOR 12/18/2006 AT 10:00 AM.

11/15/2006
CPCAL 11/16/2006 08:03:14

/s/ 11/20/06
Judge Signature Date

PVER
11/15/2006

APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 2009-0728

[Filed July 1, 2009]

State of Ohio,	)
	)
v.	)
	)
Elsebeth Baumgartner,	)
	)

Upon Consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismiss the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; Nos. 89190, 91207, and 91208)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX E

Eminem's song Soldier unedited lyrics

I'm a soldier
I'm a soldier
I'm a soldier
I'm a soldier

Verse 1
Yo...
Never was a thug, just infatuated with guns
Never was a gangsta, till I graduated to one
And got the rep of a villain, for weapon concealin'
Took the image of a thug, kept shit appealin'
willin' to stick out my neck, for respect if it meant life or death
never live to regret what I said
when you're me, people just wanna see, if it's true,
if it's you, what you say in your raps, what you do
so they feel, it's part of your obligation to fulfill,
when they see you on the streets, face to face, are you for real
in confrontation ain't no conversation, if you feel
you're in violation, any hesitation'll get you killed
if you feel it, kill it,
if you conceal it, reveal it
Bein' reasonable will leave you full of bullets,
pull it, squeeze it till it's empty,
tempt me, push me, pussies,
I need a good reason to give this trigger a good squeeze...

Chorus
I'm a soldier, these shoulders hold up so much,
they won't budge, I'll never fall or fold up
I'm a soldier, Even if my collar bones crush or crumble,
I will never slip or stumble
I'm a soldier, These shoulders hold up so much,
they won't budge, I'll never fall or fold up
I'm a soldier, Even if my collar bones crush or crumble,
I will never stumble

Verse 2
I love pissin' you off, it gets me off,
like my lawyers, when the fuckin' judge lets me off
all you motherfuckas gotta do is set me off
or violate me, and all the motherfuckin' bets be off
I'm a lit fuse, anything I do, bitch, is news,
pistol whippin' motherfuckin' bouncers, six-two,
who needs bullets? Soon as I pull it, you sweat bullets,
an excellent method to get rid of the next bully
And actually better cause instead you murderin',
you can hurt 'em and come back again and kick dirt at 'em
It's like pourin' salt in the wounds, assault and get sued,
you can smell the lawsuits as soon as I waltz in the room
everybodys halts and stops, calls the cops,
all you see is bitches comin' out their halter tops
runnin' and duckin' out the Hot Rocks parkin' lot,
you'll all get shot whether its your fault or not cos...

Chorus

Verse 3
I spit it slow so these kids know that I'm talkin' to 'em,
give it back to these damn critics and sock it to 'em

I'm like a thug, with a little bit of Pac influence,
I spew it, and look how I got you bitches rockin' to it
you motherfuckas could never do it like I could do it,
don't even try it, you'll look stupid, do not pursue it
don't ever in your life, try to knock the truest,
I spit the illest shit, ever been dropped to two-inch
so ticky-tock, listen as the sound ticks on the clock
listen to the sound of Kim as she licks on a cock
listen to the sound of me spillin' my heart through this pen,
you motherfuckers know that I'll never be Marshall again
Full of controversy until I retire my jersey,
till the fire inside dies and expires at thirty
and Lord have mercy on any more of these rappers that verse me,
and put a curse on authorities in the face of adversity
I'ma...

Chorus

your Left, your Left, your Left, Right, Left
your Left, your Left, your Left, Right, Left
your Left, your Left, your Left, Right, Left
your Left, your Left, your Left, Right, Left